No. 10382

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LETTIE LEE, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon a petition filed by the National Labor Relations Board for enforcement of an order issued against Lettie Lee, Inc., pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*). Respondent is a California corporation engaged in business at Los Angeles, California, where the unfair labor practices occurred. This Court has jurisdiction of the proceedings under Section 10 (e) of the Act.

The pertinent provisions of the Act are set out in the appendix, *infra,* pp. 21–22.

STATEMENT OF THE CASE

Upon charges and amended charges filed by International Ladies' Garment Workers' Union, Cutters Local No. 84, A. F. L. (herein called the Union), and upon the usual proceedings had pursuant to Section 10 of the Act, fully set forth in the Board's decision (R. 55), the Board on November 9, 1942, issued its findings of fact, conclusions of law, and order (R. 55; 45 N. L. R. B. 448), which may be briefly summarized as follows:

1. *Nature of respondent's business* (R. 59–60).—Respondent, a California corporation having its office and place of business at Los Angeles, California, is engaged in the manufacture of dresses. Most of the raw materials used in the conduct of its business are obtained from sources outside the State of California and the major portion of its finished products are sold to extra-state purchasers.[1]

2. *The unfair labor practices* (R. 86).—The Board found that on and after July 22, 1941, respondent refused to bargain collectively with the Union, thereby violating Section 8 (5) and (1) of the Act; discriminatorily refused to reinstate six employees who participated in a strike caused and prolonged by respondent's unfair labor practices, thereby violating Section 8 (3) and (1) of the Act; and in these and other respects interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act, thereby violating Section 8 (1) of the Act.

[1] Respondent concedes that it is engaged in interstate commerce within the meaning of the Act (R. 188).

3. *The Board's order* (R. 87–90).—The Board ordered respondent to cease and desist from its unfair labor practices; to bargain collectively with the Union; to offer reinstatement or placement upon a preferential list, with back pay, to three striking employees who were discriminatorily refused reinstatement; upon application, to offer reinstatement or placement upon a preferential list to three other striking employees who were discriminatorily refused reinstatement and who subsequently were offered and refused to accept reinstatement, with back pay from five days after the date of any refusal of their applications for reinstatement; and to post appropriate notices.

SUMMARY OF ARGUMENT

I. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act.

II. The Board's order is valid and proper.

ARGUMENT

Point I

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1), (3) and (5) of the Act

A. Sequence of events

1. The union organizing campaign; respondent's hostile reaction

In May 1941 the International Ladies Garment Workers Union (herein called the International) in-

augurated a campaign to organize the employees of unorganized dress manufacturing plants in Los Angeles and vicinity (R. 191–192). Particularly active in this campaign was Cutters Local No. 84, which attempted to interest respondent's cutters in the organization (R. 117, 191–197). The cutters did not at once join the Union, but they did, however, present Sam Bothman, respondent's secretary-treasurer and general manager (R. 351, 354), with a joint request for a wage increase about this time (R. 117, 267, 299–300, 633).

On June 11, 1941, Bothman called the cutters together in the cutting room after work, ostensibly to reply to their request for a wage increase. Although this request was discussed Bothman took advantage of the meeting to broadcast his opposition to the Union. Thus, he opened the meeting by inquiring how many of the cutters had joined or intended to join the Union (R. 114, 154–156, 265). Receiving no response, he declared that the union officials were "a bunch of shysters" interested not in the employees, but only in their dues (R. 114–115, 265–266). He warned that the employees would have much less work if they joined the Union, that the Union would "stuff this place full of cutters and keep you fellows from getting all the work you should, and you will have to split it up with the new fellows" (R. 115, 265–266). Emphasizing his determination not to have any dealings with the Union, Bothman related an experience that he formerly had had in dealing with a union when the cutters attempted "to run the place" as a result of which he had to cease operations and "clear out" (R. 115–116). He then explicitly warned the cutters that

he would have nothing to do with the Union and would never sign a union contract, but that he would "sooner close up this place than operate under a bunch of shysters" (R. 115–116, 266–267). Confident that he had impressed the cutters that they should "stick it out together," Bothman concluded his remarks with the assertion that "he felt safe in talking to" the cutters, that he did not think they would "[walk] out if the strike was called" (R. 117).

Two days later Bothman again met with the cutters and announced that he intended to grant their request for a wage increase. He made it plain at the same time, however, that he would not tolerate any "dealings" with the Union (R. 119–121, 159–160).[2]

2. Respondent's cutters join the Union; respondent's refusal to arrange a bargaining conference with the union representatives

Despite respondent's efforts to prevent its cutters from affiliating with the Union, on July 21 a majority of respondent's cutters went to the union office and joined the organization (R. 124–125, 270–271, 293–294, 303–304, 309–310, 315–316). Commencing on July 22,

[2] Respondent's stubborn opposition to the Union was not unexpected. For over a year, at least, respondent had adhered consistently to the policy of refusing to employ union members. Thus in January 1940, when Angelo Costella applied to respondent for a job as a cutter, Bothman asked him whether he was a union man. Costella replied that he was not, and was put to work immediately (R. 312). Other applicants for employment were likewise questioned concerning their union membership and after ascertaining that they were not union members, were given employment with respondent (R. 112, 279–280, 284). At the hearing, Bothman admitted having sometimes asked applicants for employment whether they were union members. He could not recall the names of any union members he had hired (R. 389–390).

the Union, through David Sokol, its attorney, repeatedly called General Manager Bothman on the telephone, and although Sokol left messages to the effect that the Union represented a majority of respondent's cutters and desired to have Bothman call him for the purpose of arranging a bargaining conference (R. 243–247),[3] and although Bothman concededly was informed of these calls (R. 263, 809), he at no time made any effort to communicate with Sokol or any other representative of the Union and no bargaining conference was ever arranged (R. 248, 683–684, 687).[4]

3. The strike; respondent's efforts to induce the cutters to abandon the Union and return to work; respondent ignores the Union's written requests for a bargaining conference

As a result of respondent's refusal to answer Attorney Sokol's requests for a bargaining conference, the strike committee of the International, at a meeting held on the evening of July 23, decided to include respondent among the companies against which a strike was to be called on the morning of July 24 (R. 199–200, 224, 228). On that morning the six cutters employed by respondent went out on strike and a picket line was formed outside the plant (R. 128, 274, 296, 311, 317).

During the strike respondent continued to manifest intense opposition to the Union and sought to induce the strikers individually to abandon the strike and re-

[3] Sokol emphasized that a failure to recognize the Union might result in a strike and that Bothman's failure to return his calls "aggravated the situation" (R. 244, 247).

[4] Finally on July 25 the person answering respondent's telephone informed Attorney Sokol that Bothman "will not answer your calls" (R. 263).

turn to work. On several occasions General Manager Bothman told the strikers that they were "fools" and "chumps" for not going back to work and again characterized the Union representatives and officials as "shysters" and "chiselers" who were "just looking out for themselves" (R. 131, 141–143, 276; cf. 130). He also reiterated his earlier warning that respondent would close the plant rather than sign a contract with the Union (R. 142).

On September 8, 1941, Attorney Sokol wrote respondent that the Union represented a majority of its cutters and requested respondent to bargain with the Union (R. 250–252). Sokol again wrote respondent on September 9 and 13, 1941, making the same request, but respondent ignored both of these communications, as it did Sokol's letter of September 8 (R. 253, 255–258, 382–383, 384). Respondent at no time replied to or acknowledged the Union's many requests for bargaining conferences, either oral or written (R. 383).

4. Respondent's refusal to reinstate the strikers; its further attempts to undermine the Union

In Attorney Sokol's letters to respondent of September 9 and 13, 1941, he also requested the immediate reinstatement of all the striking cutters (R. 253, 255–258). Respondent, however, as shown above, ignored these union requests. Instead, during October it dealt directly with several of the strikers, offering them reinstatement, but making it plain at the same time that it was offering them reinstatement as "individuals" and that its position with respect to the Union remained unchanged. Thus, en-

countering Employees Cimarusti, Berteaux, and Quinn on the picket line in October, Bothman asked each of them to return to work and added that he did not "want to have anything to do with those chiselers up there." When they asked if Bothman would reinstate the other three striking employees, he replied "No, I am talking to you as individuals. I am not going to talk to you in a group," and declared that of the three other strikers, two were "trouble makers" and "stinkers," that the third was an ex-convict, and that he did not "want anything to do with" them (R. 143–145, 275–277, 290–292, 294–295, 299). The three cutters refused to accept reinstatement because of respondent's refusal to reinstate the strikers as a group and its steadfast refusal to recognize the Union (R. 145, 277).

Swartz, foreman of the cutting room (R. 478, 486), also sought to undermine the Union by soliciting two employees individually to return to work.[5] As in the

[5] Respondent's attempt to avoid responsibility for the acts of Foreman Swartz is clearly unwarranted. Swartz supervises the employees in the cutting room and distributes the work among them according to their varying capabilities, interviews applicants for positions, and is paid $10 a week more than the other cutters (R. 151–152, 183, 302, 308, 486, 524–526, 567). Swartz is referred to by the employees in the cutting room as their "foreman" (R. 113, 152, 279, 478). Thus Swartz plainly occupied a position of sufficient responsibility with respondent to warrant holding respondent accountable for his conduct whether or not it was within "the scope of [his] authority or contrary to the desires or instructions" of respondent. *N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1007 (C. C. A. 9); *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. (2d) 676 (C. C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780, 787 (C. C. A. 9); *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 520–521; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 599.

case of General Manager Bothman's attempts to break the solidarity of the strikers, Swartz's offers of reinstatement were accompanied by disparaging remarks concerning the Union and threats that respondent would close the plant before it would sign a contract with the Union (R. 145–148, 178, 280–281). Swartz also predicted that "the Union [was] going to drop" them and that they would be left "holding the sack in a couple of weeks" (R. 147, 278, 280–281).

B. Conclusions concerning respondent's unfair labor practices

1. Respondent's violations of Section 8 (5) and (1) of the Act

a. The Union's majority status in an appropriate bargaining unit

Respondent employs approximately 110 employees in its production operations, of whom 10 are non-supervisory cutters who work in a separate part of the plant called the cutting room (R. 653–654, 133–134).[6] Several other employees who perform no cut-

[6] Respondent contended before the Board that it employed 12 cutters. One of these 12, however, was Louis Swartz, the foreman of the cutting room, whom the Board properly excluded from the unit because of his supervisory status (see p. 8, n. 5, *supra*). Another of the 12 was Robert Thain, a brother of Lettie Lee, president of respondent (R. 445–446), who was employed by respondent as a cutter prior to January 1941 (R. 451). At that time he left respondent's employ for an indefinite period of time because of his health, and did not return to work until December 1941 (R. 447–449, 450, 575). An examination of respondent's pay roll for the week ending July 25, 1941, shows 10 employees in the appropriate unit (Bd. Ex. 15 B). Thain's name was not carried on the pay roll for that period, although the name of Katherine Lembke, another employee who took a leave of absence in May 1941, was continued on the pay roll throughout her absence (Bd. Ex. 15, R. 324–325, 331, 681). Nor was Thain's name included in

ting operations, such as assorters or bundlers and a stock girl, also work in the cutting room (R. 134–135, 138, 171–174). Only qualified cutters, however, are eligible for membership in Local 84; consequently the union has confined its organizing efforts to respondent's cutters exclusively (R. 200–201, 213–214, 216, 225–226, 241). It does not appear that respondent's other production employees have any desire for affiliation with the Union.

The Board, upon the basis of the differentiation between the type of work performed by the cutters and respondent's other production employees, the extent of organization in the plant, the ineligibility to membership in Local 84 of respondent's other production employees, and the absence of a desire on the part of respondent's other production employees for membership in the Union or any other labor organization, rejected respondent's contention that all its production employees, or at least all the employees of the cutting room, constituted an appropriate unit. It found (R. 70) that respondent's cutters alone, excluding supervisory employees, constitute a unit appropriate for collective bargaining. The factors upon which the Board relied in so finding have been repeatedly held to constitute a proper basis for a unit determination. *Bussmann Mfg. Co.* v. *N. L. R. B.*, 111 F. (2d) 783, 785

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the list of employees in the cutting department furnished to the Regional Office of the Board by respondent on September 11, 1941 (R. 585). On the above undisputed facts the Board's finding (R. 74) "that Thain was not an employee of the respondent on July 22, 1941," is manifestly sound.

(C. C. A. 8); *N. L. R. B.* v. *Calumet Steel Division,* 121 F. (2d) 366, 369 (C. C. A. 7); *N. L. R. B.* v. *Botany Worsted Mills,* 133 F. (2d) 876, 880 (C. C. A. 3), cert. denied May 17, 1943; *Marlin-Rockwell Corp.* v. *N. L. R. B.,* 116 F. (2d) 586, 587 (C. C. A. 2).[7] Since the determination was neither arbitrary nor capricious, it may not be disturbed. *Pittsburgh Plate Glass Co.* v. *N. L. R. B.,* 113 F. (2d) 698, 700–701 (C. C. A. 8), aff'd 313 U. S. 146; *N. L. R. B.* v. *Carlisle Lumber Co.,* 94 F. (2d) 138, 143 (C. C. A. 9), cert. denied 304 U. S. 575; *N. L. R. B.* v. *Sunshine Mining Co.,* 110 F. (2d) 780, 789 (C. C. A. 9), cert. denied 312 U. S. 678; see also *Bussmann, Calumet Steel,* and *Botany* cases, *supra.*

The Union's majority status in the appropriate bargaining unit is not open to question. Six of the 10 cutters in the appropriate unit took the stand and identified cards signed by them on July 21, 1941, designating the International as their "sole representative in collective bargaining" with their employer (R. 124–125, 270–271, 293, 303, 309–310, 315–316). The Board thus properly found (R. 75) that on July 22, 1941, and at all times thereafter, the Union was the exclusive statutory representative of a majority of respondent's employees in an appropriate bargaining unit.

b. Respondent's refusal to bargain collectively with the Union

The evidence recounted above plainly compelled the Board's conclusion (R. 76–77) that "on July 22, 1941,

[7] See also the Board's *Fourth Annual Report*, at p. 83; *Seventh Annual Report*, at p. 59.

and at all times thereafter the respondent by failing to respond to the Union's requests for a bargaining conference, and by its solicitation of strikers, as individuals, to return to work, refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit." Respondent's persistent refusal to meet with the Union and its failure even to reply to the Union's requests for collective bargaining were plain violations of Section 8 (5) of the Act. Likewise, in going over the head of the Union and attempting to deal with some of the strikers directly respondent breached its obligations under Section 8 (5) of the Act. *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 22–23 (C. C. A. 9); *N. L. R. B. v. Remington Rand, Inc.*, 94 F. (2d) 862, 870 (C. C. A. 2), cert. denied 304 U. S. 576; *N. L. R. B.* v. *Lightner Publishing Corp.*, 113 F. (2d) 621, 625 (C. C. A. 7); *Valley Mould & Iron Corp.* v. *N. L. R. B.*, 116 F. (2d) 760, 762 (C. C. A. 7), cert. denied 313 U. S. 590; *N. L. R. B.* v. *Highland Shoe, Inc.*, 119 F. (2d) 218, 220–222 (C. C. A. 1).[8]

[8] Respondent's unlawful refusal to bargain and its solicitation of strikers, as individuals, to return to work also constituted interference, restraint, and coercion in violation of Section 8 (1) of the Act, as the Board found (B. A. 77). As this Court has said concerning such individual solicitation, quoting from the opinion of the Second Circuit in *N. L. R. B.* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 420: "To permit the employer to go behind the chosen bargaining agent and negotiate with the employees individually, or with their committees, in spite of the fact that they had not revoked the agent's authority, would result in nothing but disarrangement of the mechanism for negotiation created by the Act, disparagement of the services of the Union, whether good or bad, and acute, if not endless, friction, which it

Respondent's belated defense that it refused to meet and bargain with the Union for the reason that it did not believe a unit confined exclusively to cutters was an appropriate unit within the meaning of Section 9 of the Act and for the further reason that it doubted that the Union represented a majority of the cutters is clearly without merit. Admittedly at no time during the period the Union was attempting to arrange a bargaining conference with respondent, did it make any mention of its alleged doubts either as to the appropriateness of a unit of cutters or to the Union's majority status among the cutters (R. 385, 683–684). Not until the hearing did respondent, for the first time, question the appropriateness of the unit and the Union's representation among the cutters. In view of respondent's whole course of conduct, particularly its repeated threats that it would close the plant rather than deal with the Union (*supra,* pp. 5, 7, 9), the Board was fully justified in concluding (R. 76), that

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is the avowed purpose of the Act to avoid or mitigate." *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. (2d) 676, 681. Respondent's questioning of prospective employees concerning their union membership (*supra*, p. 5, n. 2), its making of derogatory statements concerning the Union and union officials (*supra*, pp. 4, 7, 8, 9), and its threats to cease business rather than sign a contract with the Union (*supra*, pp. 5, 7, 9), constituted further interference, restraint, and coercion in violation of Section 8 (1) of the Act, as the Board found (R. 68). See, for example, *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518; *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 76–77; *N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1005–1006 (C. C. A. 9); *N. L. R. B.* v. *Boswell*, decided May 24, 1943 (C. C. A. 9); *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. C. A. 9), cert. denied 312 U. S. 678; *N. L. R. B.* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 195–196 (C. C. A. 9).

"the real reason for [General Manager Bothman's] refusal to respond to Sokol's calls was respondent's desire to avoid bargaining collectively with the Union as the representative of any of its employees" rather than "any bona fide doubt as to the appropriateness of the unit claimed by the Union" and that "its subsequent questioning the unit was merely an afterthought." Here, as in *N. L. R. B.* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18, 22 (C. C. A. 9), in which the employer also made no objection to bargaining on the basis of the propriety of the unit, "The Board was entitled to draw the inference that respondent's refusal to negotiate with the Union was motivated, not by doubt as to the appropriate unit, but by a rejection of the collective bargaining principle." *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 660 (C. C. A. 9).[9]

In view of respondent's complete negation of its obligations under the Act the Board was plainly justified in concluding (R. 77) that respondent's "failure to reply to the Union's requests" for a bargaining conference caused the strike which commenced on July 24, 1941, and that respondent's persistent "refusal to deal with the Union" during the strike and its attempts

[9] See also *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 789 (C. C. A. 9), cert. denied 312 U. S. 678; *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 868–869, cert. denied 304 U. S. 576; *N. L. R. B.* v. *Clarksburg Publishing Co.*, 120 F. (2d) 976, 980 (C. C. A. 4); *Stewart Die Casting Corp.* v. *N. L. R. B.*, 114 F. (2d) 849, 854 (C. C. A. 7), cert. denied 312 U. S. 680; *N. L. R. B.* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250, 254 (C. C. A. 8).

"to persuade its employees to abandon the strike and * * * to split the ranks of the strikers by stating that it would take back some but not all, of them * * * served to prolong the strike."

2. Respondent's violations of Section 8 (3) and (1) of the Act

a. Respondent's discriminatory refusal to reinstate the strikers

The Board found (R. 80) that "on or about September 10, and thereafter, the respondent, by refusing to reinstate its striking employees [naming them], discriminated in regard to their hire and tenure of employment, thereby discouraging membership in the Union and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act." This finding is compelled by the evidence.

As we have shown, the Union on September 9 and 13, notified respondent by letter that the striking employees were ready and willing to return to work and requested their reinstatement.[10] Respondent failed even to answer these letters. Subsequently, in October, respondent offered Cimarusti, Quinn, and Berteaux, three of the six striking employees, reinstatement "as individuals" and at the same time made it clear that it would not reinstate the other three.[11] This offer was rejected by the three strikers because of respondent's refusal to reinstate their colleagues and its persistent refusal to recognize

[10] The striking cutters were Cimarusti, Quinn, Baliber, Berteaux, Costella, and Sardo.

[11] These three were Baliber, Costella, and Sardo.

and bargain with the Union (*supra*, p. 8). Since the strike was caused and prolonged by respondent's refusal to bargain collectively with the Union and its other unfair labor practices (see pp. 6–7, 8–9, *supra*), respondent was obligated to reinstate the strikers upon application, even though to do so necessitated the removal of the employees hired to replace them; its failure to reinstate the strikers on or about September 10 clearly warranted the Board in finding that respondent had engaged in anti-union discrimination in violation of Section 8 (3) of the Act.[12] *N. L. R. B.* v. *Grower-Shipper Vegetable Ass'n,* 122 F. (2d) 368, 378 (C. C. A. 9); *M. H. Ritzwoller Co.* v. *N. L. R. B.,* 114 F. (2d) 432, 437 (C. C. A. 7); *Rapid Roller Co.* v. *N. L. R. B.,* 126 F. (2d) 452, 460, 461 (C. C. A. 7), cert. denied 317 U. S. 650; *United Biscuit Co.* v. *N. L. R. B.,* 128 F. (2d) 771, 774 (C. C. A. 7); *N. L R. B.* v. *Remington Rand, Inc.,* 130 F. (2d) 919, 927–928 (C. C. A. 2); cf. *N. L. R. B.* v. *Montgomery Ward & Co.,* 133 F. (2d) 676 (C. C. A. 9), enf'g 37 N. L. R. B. 100, 131–132; *N. L. R. B.* v. *Sunshine Mining Co.,* 110 F. (2d) 780, 792 (C. C. A. 9), cert. denied 312 U. S. 678.

Respondent sought to explain its failure to offer reinstatement to Sardo upon the ground that he had been convicted of a felony (R. 824–825). Although the fact of Sardo's conviction came to the attention

[12] The Board, taking cognizance of the fact that Cimarusti, Quinn, and Berteaux refused respondent's offer of reinstatement in October, treated them as having resumed the status of strikers and in the order relieved respondent of the obligation to pay back pay to these employees during the period they maintained this status (R. 81, 83–84).

of General Manager Bothman shortly after the strike began (R. 630, 792), respondent in its answer to the Board's complaint herein made no claim that Sardo was not reinstated for this reason, but on the contrary alleged that it had "at all times been and now is ready and willing to allow and permit said employees to return to their work" (R. 15, 692–693). Respondent advanced no explanation for its refusal to offer reinstatement to Baliber and Costella other than the fact that it had no vacancies available for them, an explanation which is palpably false.[13] In view of the spuriousness of the excuse offered for the failure to reinstate Sardo, the absence of any valid explanation for the refusal to reinstate Baliber and Costella, and respondent's persistent efforts to subvert the Union and to effect the return of some of the strikers as individuals, the Board was fully justified in concluding (R. 80) "that Sardo's criminal record was not in fact the reason for refusing his reinstatement, but that the respondent was unwilling to reinstate any of its striking employees unless they returned to work as individuals and not as a group represented by the Union, and was seeking to rid itself of some of the

[13] The record affirmatively shows that respondent employed at least four new cutters during the strike (R. 325–328, 332–333; cf. 346–348), whom respondent was obligated to discharge, if necessary, to make room for the strikers (see p. 16, *supra*), and that despite the employment of these four new cutters, respondent still had sufficient need for cutters to require, in addition, the services of Cimarusti, Quinn, and Berteaux, three of the striking cutters (see pp. 7–8, *supra*).

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strikers completely." Cf. *N. L. R. B.* v. *Blanton Co.*, 121 F. (2d) 564, 570 (C. C. A. 8); *Eagle-Picher Mining & Smelting Co.* v. *N. L. R. B.*, 119 F. (2d) 903, 915 (C. C. A. 8).

Point II

The Board's order is valid

Paragraphs 1 (a), (b), and (c) of the order (R. 87–88) requiring respondent to cease and desist from the specific unfair labor practices found and to cease in any other manner from interfering with its employees in the exercise of their right to self-organization and collective bargaining are unquestionably valid upon the facts of this case. *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 432–438.

Paragraph 2 (a) of the order (R. 88) directing respondent upon request to bargain collectively with the Union is the normal remedial order entered upon findings of a refusal to bargain. Similarly, paragraph 2 (b) (R. 88) requiring respondent to offer reinstatement or placement upon a preferential list to the three striking employees whom respondent discriminatorily refused to reinstate, paragraph 2 (d) (R. 89) requiring respondent to make these employees whole for their losses resulting from respondent's unlawful discrimination against them, and the first part of paragraph 2 (e) (R. 89) requiring respondent to make whole the other three striking employees for their losses during the period between respondent's discriminatory refusal to reinstate them and their rejec-

tion of respondent's offer of reinstatement, are the "conventional" remedial requirements entered upon findings of antiunion discrimination in violation of Section 8 (3) of the Act. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 187.

Paragraph 2 (c) (R. 88) and the second part of paragraph 2 (e) (R. 89) directing respondent upon application, to offer reinstatement or placement on a preferential list to the three striking employees who, subsequent to respondent's discriminatory refusal of their applicatios for reinstatement, were offered and refused to accept reinstatement, with back pay commencing 5 days after any further refusal of their applications for reinstatement, are clearly proper remedial provisions under the circumstances of this case. As we have shown (*supra,* p. 8), these employees refused respondent's offer of reinstatement because of respondent's unfair labor practices, namely, its refusal to reinstate all of the strikers in a group and its continued refusal to bargain with their chosen representatives. As unfair labor practice strikers these employees were entitled, in the absence of some valid reason for discharge, to reinstatement upon application, and back pay from any refusal of their application for reinstatement, as was ordered in the abovementioned paragraphs. See cases cited on p. 16, *supra.*

Paragraphs 2 (f) and (g) (R. 89–90) requiring the posting of appropriate notices and the filing of the requisite compliance reports are of settled validity..

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that the Board's order is wholly valid, and that a decree should issue affirming and enforcing said order in full.

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MAY 1943.

APPENDIX

The relevant portions of the National Labor Relations Act are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a

group of employees shall have the right at any time to present grievances to their employer.

SEC. 10 * * *

(c) * * * If * * * the Board shall be of the opinion that any person * * * has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943